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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SUMITOMO SHOJI AMERICA, INC.,

Petitioner,

—v.—

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the right provided by Article VIII(1) of the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan, to fill management level positions with Japanese nationals, is limited by Title VII of the Civil Rights Act of 1964, as amended.

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Sumitomo Shoji America, Inc. ("Sumitomo") petitions for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit dated January 9, 1981 (App. A, *infra*, 1a-15a) is reported at 638 F.2d 552. The opinion of the United States District Court for the Southern District of New York dated June 5, 1979 (App. C, *infra*, 19a-37a) is reported at 473 F. Supp. 506. Certification for immediate appeal pursuant to 28 U.S.C. § 1292(b) was granted in an opinion of the United States District Court for the Southern District of New York dated August 9, 1979 (App. D, *infra*, 39a-44a), unofficially reported at 20 Empl. Prac. Dec. (CCH) ¶ 30,205 and 20 Fair Empl. Prac. (BNA) 72. The opinion of the United States District Court for the Southern District of New York on reargument, dated November 29, 1979 (App. E, *infra*, 45a-61a), is unofficially reported at 21 Empl. Prac. Dec. (CCH) ¶ 30,501 and 21 Fair Empl. Prac. (BNA) 580.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on January 9, 1981 (App. B, *infra*, at 17a-18a). On March 31, 1981, Justice Marshall signed an order extending the time for filing a petition for a writ of certiorari to and including June 6, 1981. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

TREATY, STATUTES AND REGULATION INVOLVED

1. Article VIII(1) of the Treaty of Friendship, Commerce and Navigation Between the United States and Japan, 4 U.S.T. 2063 (1953) (the "Treaty"), provides in relevant part (4 U.S.T. at 2070):

"Nationals and companies of either Party shall be permitted to engage within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice."

2. Article I(1) of the Treaty provides in relevant part (4 U.S.T. at 2066):

"Nationals of either Party shall be permitted to enter the territories of the other Party and to remain therein: (a) for the purpose of carrying on trade between the territories of the two Parties and engaging in related commercial activities . . . ."

3. Article VII(1) of the Treaty provides (4 U.S.T. at 2069):

"Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity. Accordingly, such nationals and companies shall be permitted within such territories: (a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party; and (c) to control and manage enterprises which they have established or acquired."

4. Section 703(a) of Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. § 2000e-(2)(a), provides:

"It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual

with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

5. Section 703(e) of Title VII, 42 U.S.C. § 2000e-(2)(e), provides in relevant part:

"(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . ."

6. Section 101(a)(15)(E)(i) of the Immigration and Nationality Act of 1952, as amended (the "INA"), 8 U.S.C. § 1101(a)(15)(E), provides in relevant part:

"[A]n alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national . . . (i) solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national . . . ."

7. 22 C.F.R. § 41.40(a) (1980) provides in relevant part:

"(a) An alien shall be classifiable as a nonimmigrant treaty trader if he establishes to the satisfaction of the consular officer that he qualifies under the provisions of section 101(a)(15)(E)(i) of the Act and that: (1) He intends to depart from the United States upon termination of his

status; and (2) if he is employed by a foreign person or organization having the nationality of the treaty country which is engaged in substantial trade as contemplated by section 101(a)(15)(E)(i), he will be engaged in duties of a supervisory or executive character, or, if he is or will be employed in a minor capacity, he has the specific qualifications that will make his services essential to the efficient operation of the employer's enterprise and will not be employed solely in an unskilled manual capacity."

STATEMENT OF THE CASE

Petitioner Sumitomo, defendant in the District Court below, is a corporation organized under the laws of the State of New York and is a wholly-owned subsidiary of a Japanese commercial enterprise (App. A, *infra*, at 2a).

Respondents, plaintiffs in the District Court below, claim with one exception to be citizens of the United States and past or present female secretarial employees of Sumitomo (App. C, *infra*, at 20a).[1] They claim that "[Sumitomo's] practice of hiring only male Japanese nationals for management-level positions discriminates against them on the basis of sex and national origin in violation of Title VII . . ." (App. A, *infra*, at 3a). The jurisdiction of the District Court was invoked under 28 U.S.C. §§ 1331 and 1343 (App. C, *infra*, at 21a).

Sumitomo moved pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for an order dismissing respondents' complaint on several grounds including that Sumitomo's employment of Japanese nationals in management level positions is protected by the Treaty and does not constitute discrimination of a kind made illegal by Title VII (*id.*).

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1 Plaintiffs purport to bring their action individually and as representatives of a class (App. A, *infra*, at 3a). No motion has been made for determination whether the action may be maintained as a class action.

In its opinion dated June 5, 1979, the District Court denied Sumitomo's motion to dismiss the respondents' Title VII claim (App. C, *infra*, at 22a), holding that because Sumitomo is a New York corporation it had "neither standing nor need to invoke the aegis of the Treaty" (App. C, *infra*, at 30a).[2] In an opinion dated August 9, 1979, the District Court certified for immediate appeal pursuant to 28 U.S.C. § 1292(b) the "question concerning the relationship of Title VII to the Treaty" (App. D, *infra*, at 44a).[3]

On appeal, the Second Circuit held that Sumitomo is entitled to invoke the employment provisions of Article VIII(1) of the Treaty (App. A, *infra*, at 4a). It nevertheless affirmed the denial of Sumitomo's motion on the ground that the Treaty employment right is limited by Title VII. The Second Circuit, referring to the bona fide occupational qualification ("bfoq") exception of Title VII, 42 U.S.C. § 2000e-2(e), stated that "[t]o require the Japanese company to go forward with some evidence of bfoq status does not in our view impose undue burdens on foreign employers" (App. A, *infra*, at 15a) and remanded the case to the District Court for further consistent proceedings (*id.*).

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2 Respondents had also claimed in their complaint that Sumitomo's employment practices violate the Civil Rights Act of 1866, 42 U.S.C. § 1981, and the Thirteenth Amendment to the United States Constitution. The District Court in its June 5, 1979, opinion dismissed plaintiffs' claim based on 42 U.S.C. § 1981 and found that the Thirteenth Amendment claim had been abandoned (App. A, *infra*, at 3a & n.1).

3 On August 15, 1979, the United States Department of State released documents relating to negotiation of the Treaty, and Sumitomo requested that the District Court reconsider its June 5, 1979 opinion. The District Court granted reargument but by opinion dated November 29, 1979 (App. E, *infra*, 45a-61a) again denied the motion to dismiss.

REASONS FOR GRANTING THE PETITION

The decision of the Second Circuit in this case is in direct conflict with a decision on the same matter by the United States Court of Appeals for the Fifth Circuit in *Spiess v. C. Itoh & Company (America), Inc.*, 643 F.2d 353 (5th Cir. 1981) (App. F, *infra*, 63a-97a). The *Spiess* Court had before it, and expressly rejected, the decision of the Second Circuit in *Avigliano*. Thus this case is within the considerations of Rule 17.1(a) of the Rules of this Court. This conflict between circuits presents a particularly compelling case for the exercise of this Court's power of certiorari because of the necessity for the United States to speak as " 'one people, one nation, one power' " in its relations with foreign nations. *Zschernig v. Miller*, 389 U.S. 429, 442 (1968) (Stewart, J., concurring), *quoting Chinese Exclusion Case*, 130 U.S. 581, 606 (1889).

In *Spiess*, American employees of C. Itoh & Company (America), Inc. ("C. Itoh-America"), a New York corporation wholly owned by a Japanese parent corporation, brought an action under Title VII alleging that C. Itoh-America discriminates against its American employees by making managerial positions available only to Japanese nationals (App. F, *infra*, at 64a). C. Itoh-America moved to dismiss on the same Treaty-based grounds as Sumitomo, arguing that the Treaty "permits it to hire only Japanese citizens" for those positions (*id.*). C. Itoh-America's motion was denied by the United States District Court for the Southern District of Texas, which held that C. Itoh-America could not assert the Article VIII(1) right to employ executive personnel of its choice (App. F, *infra*, at 65a).[4]

The Fifth Circuit reversed, stating: "[W]e hold that article VIII(1) does exempt C. Itoh-America from domestic employment discrimination laws to the extent of permitting discrimination in favor of Japanese citizens in employment for executive and technical positions." (App. F, *infra*, at 72a.)

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4 The District Court's opinion in *Spiess*, including its amending opinion allowing interlocutory appeal pursuant to 28 U.S.C. § 1292(b), is reported at 469 F. Supp. 1 (S.D. Tex. 1979).

In contrast, the Second Circuit in this case held that the Treaty "does not exempt Japanese companies operating in the United States . . . from American laws prohibiting discrimination in employment." (App. A, *infra*, at 4a.) In consequence of these conflicting decisions the Fifth Circuit remanded *Spiess* with directions to dismiss while the Second Circuit remanded the instant case for trial.

The opposing decisions reached by the Second and Fifth Circuits result from direct conflicts in their interpretations of the scope of the rights established by Article VIII(1) of the Treaty and in their views of the relationship between United States international treaty obligations and domestic legislation.

The Second Circuit construed the Article VIII(1) employment right narrowly, stating that it was "primarily intended to exempt companies operating abroad from local legislation restricting the employment of noncitizens." (App. A, *infra*, at 13a-14a.) Although acknowledging that the clause "was also intended, in furtherance of the overall purpose of the Treaty, to facilitate a party's employment of its own nationals to the extent necessary to insure its operational success in the host country" (App. A, *infra*, at 14a), it declined to give effect to this purpose except to the extent deemed consistent with the bfoq exception to Title VII.[5]

The Fifth Circuit gave a broader reading to Article VIII(1). Noting that the general purpose of the Treaty, from the American perspective, was "primarily to facilitate American private-sector investment in foreign nations" (App. F, *infra*, at 77a), it declared:

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5 The Second Circuit's opinion thus assumes that the Treaty authorized practice of hiring on the basis of Japanese nationality could, unless the bfoq defense is established, constitute "national origin" discrimination under Title VII (App. A, *infra*, at 14a). This assumption is in conflict with the conclusion of this Court in Espinoza v. Farah Manufacturing Co., Inc., 414 U.S. 86, 95 (1973), that "nothing in Title VII makes it illegal to discriminate on the basis of citizenship or alienage." *See also* Morton v. Mancari, 417 U.S. 535 (1974).

> "The article VIII(1) right to free choice of technical and managerial personnel sought to ensure that the American businessman's investment in the host country would remain within his control. The legislative history cited to us by C. Itoh-America demonstrates that the Senate, in consenting to ratification of the Treaty, was concerned about the right of American companies to use American personnel to control their investments in Japan . . . . It is self-evident that this same goal of American negotiators in formulating article VIII(1) was the goal of Japanese negotiators who sought it to protect Japanese companies operating in the United States." (*Id.*)

The Fifth Circuit expressly rejected the Second Circuit's attempt to make the Article VIII(1) right of choice in employment subject to Title VII, saying that to do so "would render its inclusion in the Treaty virtually meaningless." (App. F, *infra*, at 78a.) Instead, giving effect to the purpose of the Treaty, the Fifth Circuit concluded that Article VIII(1) permits a United States subsidiary of a Japanese enterprise "to hire only Japanese personnel for executive and technical positions." (App. F, *infra*, at 80a.)

The Second and Fifth Circuits also differed on the legal effect of United States international treaty obligations in relation to domestic legislation. The Second Circuit attempted to make Article VIII(1) of the Treaty and Title VII congruent by narrowly construing the Treaty obligation and broadly construing the bfoq exception to Title VII. It characterized this approach as giving "due weight" to the rights provided by the Treaty (App. A, *infra*, at 15a). The Fifth Circuit criticized this reasoning saying that it "misapprehends the nature of a right created in the course of international bargaining." (App. F, *infra*, at 77a.) Citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963), the Fifth Circuit stated:

> "No evidence suggests that Congress intended to repudiate article VIII(1) when it enacted Title VII. Domestic

employment discrimination laws occupy a high priority on the nation's agenda, and courts often resolve statutory conflicts in their favor. In this case, however, resolving doubts in favor of Title VII would go beyond the judicial sphere of interpretation. In the absence of congressional guidance, we decline to abrogate the American government's solemn undertaking with respect to a foreign nation." (App. F., *infra*, at 79a.)

Resolution of the conflict between the Second and Fifth Circuits is essential to clarify the rights of foreign investors to manage and control, with key personnel of their choice, the enterprises they establish or acquire in the United States and the reciprocal rights of American investors to manage and control their enterprises abroad.[6] Left unresolved, the difference between the two Circuits with respect to management and control of such enterprises creates significant uncertainties that could well impair the flow of foreign direct investment between the United States and other countries.[7]

Finally, an important question of federal law arises from the Second Circuit's confusion of the purposes of Title VII with those of the INA. The INA restricts to certain specifically authorized cases the entry of aliens for purposes of assuming employment in the United States. One such case is that of nonimmigrant "treaty traders" whose entry is authorized by

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6 These rights are dealt with in Article VII(1) and Article VIII(1) of the Treaty with Japan. The "unitary structure" of those Treaty articles was recognized by the Second Circuit (App. A, *infra*, at 8a). Similar provisions are found in a number of other friendship, commerce and navigation treaties to which the United States is a party. Pending litigation brings into question employment provisions of one of those other treaties. *See* Linskey v. Heidelberg Eastern, Inc., 470 F. Supp. 1181 (E.D.N.Y. 1979).

7 American direct investment abroad totalled over $192 billion in 1979. U.S. Dep't of Commerce, *Survey of Current Business*, table 13, at 27 (Aug. 1980). Foreign direct investment in the United States in the same year reached more than $52 billion. International Trade Administration, Office of International Investment, *Fact Sheet on Foreign Investment in the United States* (U.S. Dep't of Commerce pub.) (May 1981).

the Department of State and the Immigration and Naturalization Service pursuant to bilateral treaties of friendship, commerce and navigation. *See* Article I(1) of the Treaty; Section 101(a)(15)(E)(i) of the INA, 8 U.S.C. § 1101(a)(15)(E)(i); and 22 C.F.R. § 41.40(a). The Second Circuit's decision, if allowed to stand, will result in unnecessary re-examination of these Department of State and Immigration and Naturalization Service authorizations by our Federal courts under the Title VII bfoq exception.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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